IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

ROBERT T. MILLER,

Respondent.
_____/

Case No. 73,041
[TFB #88-30,913 (10A)]

COMPLAINANT'S BRIEF IN SUPPORT OF PETITION FOR REVIEW

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SYMBOLS AND REFERENCES

In this Brief, the complainant, The Florida Bar, will be referred to as **"the Bar"**; the respondent, Mr. Miller, will be referred to as **"respondent"**.

The following symbols will be used:

T For the transcript of the referee hearing on April 13, 1989.

RR For the Report of Referee

O For the Referee's Order on Motion for Rehearing and/or Clarification

Exh For exhibit

STATEMENT OF THE CASE AND OF THE FACTS

In March of 1986, respondent drafted a will for Mr. Frederick Schmidt, a long-time client, naming himself as contingent residual beneficiary should the client's wife predecease him. (RR, p.1)

On March 26, 1986, Mr. Schmidt had sent respondent a hand-written note indicating he wished to have a will drawn. (RR, p.2) Respondent verified his client's intentions in a meeting with him on March 27, 1986. The will was executed later that day. (RR, p.2) Everything was left to Mrs. Schmidt; if she were to predecease her husband, $5,000 was to go to four specifically named individuals and the remainder to the respondent. (RR, p.2)

In October of 1986, Mr. Schmidt's wife died. Respondent became the residual beneficiary of approximately $217,348. (RR, p.1) From October of 1986 until Mr. Schmidt's death in June of 1987, respondent visited his client frequently and ran errands for him. (RR, p.2) At Mr. Schmidt's request, respondent's secretary prepared all of Mr. Schmidt's checks for his signature. (RR, p.2)

Respondent did not refer Mr. Schmidt to another attorney for independent advice nor did he discuss with Mr. Schmidt the conflict he had as residual beneficiary of the will he drafted, either before the will was executed or after the wife died. (RR, p.1)

Mr. Schmidt died in June of 1987 at the age of 99, leaving respondent approximately $217,348 as the residual beneficiary. (RR, pp.1-2) Some of Mr. Schmidt's heirs contested the will. A settlement was entered into between respondent and Mr. Schmidt's heirs whereby respondent took a substantial portion of the estate. (RR, p.l, Confidential Bar Exh.14) The exact terms of the settlement were to be kept confidential by agreement of the parties. This information was disclosed to the Bar and to the referee for the purposes of this disciplinary matter. These amounts were not made a part of the public record, however. (T, pp.5-6, 31-33)

On February 18, 1988, a complaint was filed with The Florida Bar by the attorney who represented the heirs of Edgar Schmidt. A grievance committee hearing was held on June 21, 1988, at which the respondent was present with counsel. The grievance committee voted 4-1 to find probable cause. One member voted for minor misconduct.

A formal complaint was filed in this Court on September 13, 1988, in accordance with Rule 3-7.3(j). The Honorable Steven Wallace, a County Judge in the Ninth Judicial Circuit, was originally appointed referee but recused himself on January 26, 1989. The Honorable Dorothy J. Russell, County Judge in the Ninth Judicial Circuit, was appointed referee on February 3, 1989.

A final hearing was held before the referee on April 13, 1989.

The Referee's Report was forwarded to this Court on May 5, 1989. In her report, the referee recommended that the respondent be found guilty of violating Disciplinary Rule 1-102(A)(6) for conduct adversely reflecting on his fitness to practice and 5-101(A) for accepting employment where the exercise of his professional judgment reasonably may have been affected by his own interests without the consent of the client after full disclosure. The referee recommended that respondent be found not guilty of the remaining violations charged. (RR, p.3)

As to discipline, the referee recommended that respondent be privately reprimanded by the Board of Governors, placed on probation for one year, and pay the costs of the proceeding, totalling $1,011.90. As specific terms of the probation, the

referee recommended that respondent complete an appropriate ethics course and prepare a paper on legal ethics specifically related to a lawyer's responsibility to his client when the lawyer's interests pose a potential conflict with those of the client. (RR, p.3)

On May 10, 1989, the Florida Bar filed a Motion for Rehearing/Clarification as to the recommended discipline. Said motion was denied by the referee on May 22, 1989.

The Board of Governors at its May, 1989, meeting approved the referee's findings of fact and recommendation of guilt but voted to appeal the referee's recommended discipline as erroneous given the public nature of the complaint and the seriousness of the misconduct. The Florida Bar filed a Petition for Review in this Court on June 1, 1989.

SUMMARY OF *ARGUMENT*

The referee has recommended a private reprimand as the appropriate discipline for the respondent's conduct in drafting a will naming himself as the contingent residual beneficiary.

A private reprimand is inappropriate for both procedural and substantive reasons. Rule 3-7.5(k)(1)(3) of the Rules Regulating The Florida Bar states that a private reprimand may be recommended by a referee only in cases based on a complaint of minor misconduct. Similarly, Rule 3-5.1(b) states that minor misconduct is the only type of misconduct for which a private reprimand is an appropriate disciplinary sanction.

The case at bar is a formal complaint based on a grievance committee finding of probable cause rather than a complaint of minor misconduct. Thus a private reprimand is procedurally inappropriate.

Similarily, from a substantive standpoint, a private reprimand is inappropriate. The seriousness of the respondent's actions and the potential for injury to the client mandate nothing less than a public reprimand.

ARGUMENT

POINT ONE

THE RULES OF DISCIPLINE PROHIBIT PRIVATE DISCIPLINE IN A PUBLIC PROBABLE CAUSE CASE.

Effective January 1, 1987, at 12:01 A.M., the Rules Regulating The Florida Bar replaced the prior disciplinary rules. See The Florida Bar Re: Rules Regulating The Florida Bar, 494 So.2d 977 at 978 (Fla. 1986). Although the misconduct in the case at bar occurred prior to January 1, 1987, the discipline to be imposed is dictated by the "new" rules, that is, the Rules Regulating The Florida Bar. In The Florida Bar v. Greenberg, 534 So.2d 1142 (Fla. 1988), this Honorable Court held that when the misconduct occurred prior to 1987 but the Bar's Complaint was filed and the hearing before the referee took place after the new rules became effective on January 1, 1987, the new rules, including the five year disbarment provision, applied in that case. This principle was recently reaffirmed in The Florida Bar v. Ryder, 540 So.2d 121 (Fla. 1989).

The new rules divide misconduct into two separate categories: Findings of minor misconduct to be handled confidentially and probable cause findings to be handled publicly by the filing of a formal complaint. Minor misconduct is a term of art which refers to a specific type of discipline which results in a private reprimand. It has a specific meaning within the Rules of Discipline and does not refer to attorney misconduct

which one happens to deem of small significance. The term refers to one of the findings which can be made against an attorney only by a grievance committee or by the Board of Governors.

Cases based on a finding of minor misconduct are handled in a confidential manner. If either the Board of Governors or the respondent rejects the report of minor misconduct then a complaint of minor misconduct is filed in this Court. Confidentiality then remains in effect until this Court enters an order imposing public discipline. See Rules 3-5.1(b)(4) and 3-7.3(m) of the Rules of Discipline.

In the present case, there was no finding of minor misconduct by the grievance committee and this was not a complaint of minor misconduct based upon the respondent's or the Board's rejection of the minor misconduct report. The Bar submits that the grievance committee had a possible option to find minor misconduct if it *so* chose, but it did not select that option. Instead the grievance committee found probable cause for violation of Rules 1-102(A)(6), 5-101(A), 5-104(A), 5-105(A), 5-105(B) and 5-105(C). Neither the respondent nor the referee can change a finding of probable cause into minor misconduct.

While previously a referee could recommend a private reprimand, the new rules adopted January 1, 1987, prohibit such a

discipline except in cases in which a complaint of minor misconduct has been filed. Rule 3-7.5(k)(1) describes those items to be included in the referee's report. Subsection 3 of that rule states:

> (3) recommendations as to the disciplinary measures to be applied, provided that a private reprimand may be recommended only in cases based upon a complaint of minor misconduct. (Emphasis added)

Allowing the referee in the present case to recommend a private reprimand when there was no complaint of minor misconduct filed would ignore the underscored language of Rule 3-7.5(k)(1)(3) or at least render it totally meaningless.

The only rule which mentions the recommendation of a private reprimand not expressly tied to a finding of minor misconduct is Rule 3-5.1(a). Under this rule, the Florida Supreme Court may, in its discretion, recommend such discipline. The Bar argues, however, that this recommendation is reserved for cases involving the rejection of a minor misconduct report by the accused attorney or the Board of Governors pursuant to Rule 3-7.3(m) or 3-5.1(b)(4).

Furthermore, according to Rule 3-7.1(a)(2), a formal complaint for other than minor misconduct becomes public upon filing by staff counsel in the Supreme Court. The complaint in

this case became public on September 13, 1988. From a public image prospective, the fact that a case is now public is itself a convincing argument in favor of public discipline. To allow a referee to recommend a private reprimand in a case which is already public, would only add fuel to the fire of public outrage at the Bar's secretive system of discipline. The public has a right to know the outcome and the discipline imposed in a case of which they were already aware. Protection of a favorable image of the legal profession is an important goal of attorney discipline. The Florida Bar v. Larkin, 447 So.2d 1340, 1341 (Fla. 1984).

Thus for the foregoing reasons, a recommendation of a private reprimand in this case, which was not filed as a complaint of minor misconduct but was a formal public complaint, is procedurally inappropriate and outside the authority of the referee. Rather, The Florida Bar recommends a discipline of a public reprimand, probation as stipulated by the referee, and the payment of costs.

ARGUMENT

POINT TWO

A PUBLIC REPRIMAND, PROBATION, AND THE PAYMENT OF COSTS IS THE MORE APPROPRIATE DISCIPLINE GIVEN THE NATURE OF THE MISCONDUCT.

The Bar does not dispute the findings of fact in this matter. Nor does the Bar dispute the referee's recommendation of guilt wherein she found respondent guilty of violating Disciplinary Rules 1-102(A)(6) and 5-101(A). The referee has recommended that respondent be privately reprimanded by the Board of Governors, be placed on one year of probation, and pay the costs of the proceeding. It is the Bar's position, however, that the recommendation of a private reprimand is not appropriate given the nature of the misconduct.

The referee found that respondent had accepted employment where the exercise of his professional judgment on behalf of his client reasonably may have been affected by his own interests without the consent of the client after full disclosure. She further found that respondent never disclosed to his client the conflict that his preparing the will presented, nor did he disclose the ramifications of the client's wife predeceasing him. (RR, p.3)

This Court has found violations of Disciplinary Rule 5-101(A) in several cases. Those cases, however, involve different factual circumstances, most often a financial or business transaction with the client. The attorney/client business transaction is somewhat analogous to the circumstances in this case in that the attorney's interests are potentially in conflict with those of the client and the opportunity for overreaching and taking advantage of the client's inferior position is present. This Court has held a public reprimand to be an appropriate discipline in this type of situation.

In The Florida Bar v. Golden, 401 So.2d 1340 (Fla. 1981), this Court imposed a public reprimand in a case wherein the respondent borrowed money from the client and failed to repay it for nearly two years. In The Florida Bar v. Tunsil, 513 So.2d 120 (Fla. 1987), and The Florida Bar v. Israel, 327 So.2d 12 (Fla. 1975), this Court dealt similarly with attorney/client loan transactions.

In The Florida Bar v. Novak, 313 So.2d 727 (Fla. 1974), the respondent prepared a will for his elderly client leaving the bulk of her estate to himself. In addition he prepared a warranty deed conveying the client's residence to him while reserving a life estate to the client. He also prepared a trust agreement allowing himself to take possession of her assets and

to make loans to himself. Respondent also arranged to be compensated $100 per week as the client's caretaker. Respondent then made a loan of **$24,500** to himself and his wife and executed a promissory note at 6% interest.

The client later became dissatisfied with this arrangement and hired a new attorney. Respondent then filed a petition to have the client declared incompetent. The petition was denied. The client subsequently executed a new will excluding the respondent. Respondent then voluntarily turned over all the assets to the client, returned his fees, reconveyed the house back to the client, and prepaid the note in full plus interest. This Court approved the referee's finding that respondent had violated **5-104(A)** and publicly reprimanded him for this conduct.

While the conduct in the case at bar is certainly not as egregious as that in Novak, the respondent herein, by drafting the will and failing to disclose the possible conflict to the client also "place[d] himself in a position where he could not properly exercise his professional judgment to the best interest of his client." Id. at **729**.

There is a scarcity of case law in Florida involving the act of an attorney drafting a will naming himself a beneficiary. **As** pointed out by the referee, respondent's conduct in this matter

would now be expressly prohibited by 4-1.8(c) of the Rules of Professional Conduct, which became effective January 1, 1987. (O, p.2) Prior to that time Ethical Considerations 5-5 and 5-6 prohibited such conduct. While the preamble to the Florida Code of Professional Responsibility states that the ethical considerations are merely aspirational and not mandatory, this Court has disciplined attorneys for violations thereof in the past. See Cerf v. State, 458 So.2d 1071 (Fla. 1984) (EC 1-5); The Florida Bar v. Perry, 377 So.2d 712 (Fla. 1979) (EC 5-3); Hodkin v. The Florida Bar, 293 So.2d 56 (Fla. 1974) (EC 5-7); The Florida Bar v. Dawson, 318 So.2d 385 (Fla. 1975) (EC 5-8); The Florida Bar v. Ryan, 394 So.2d 996 (Fla. 1981) (EC 1-5).

While Florida may not have addressed the attorney as drafter/beneficiary situation, other jurisdictions have decided similar issues in similar factual circumstances. While, "[t]he disciplinary cases involving a lawyer drafting a will in which he is named as the beneficiary arrive at no single consensus," some general principles do emerge. Disciplinary Board v. Amundson, 297 N.W.2d 433, 438 (N.D. 1980).

Two courts have gone so far as to prohibit such conduct outright, absent very specific circumstances. The Iowa Supreme Court has held that violation of an ethical consideration, standing alone, will support disciplinary action in a case where

the respondent was charged with drafting certain wills naming himself as contingent beneficiary. Committee on Professional Ethics v. Behnke, 276 N.W.2d 838 (Iowa), appeal dismissed, 444 U.S. 805, 100 S.Ct. 27, 62 L.E.2d 19 (1979). In the Committee on Professional Ethics v. Randall, 285 N.W.2d 161 (Iowa 1979), cert. denied, 446 U.S. 946, 100 S.Ct. 2175, 64 L.E.2d 802, (1980), the Iowa Supreme Court disbarred a former president of the American Bar Association, relying only on EC 5-5. The court then created a new DR 5-101(B), adopting the language of EC 5-5, absolutely prohibiting a lawyer from being named a beneficiary in a non-relative's will unless it is prepared by an unassociated lawyer.

In Wisconsin, the Supreme Court has explicitly stated that:

> "...a lawyer may be the scrivener of a will in which he is a beneficiary only when he stands in relationship to the testator as the natural object of the testator's bounty and where under the will he receives no more that would be received by law in the absence of a will. Under any other circumstances in which the lawyer-draftsman is a beneficiary, this court will conclude that the preparation of such a will constitutes unprofessional conduct." State v. Collentine, 39 Wis.2d 325, 159 N.W.2d 50, 53 (1968).

In that case the lawyer prepared a will bequeathing the residue of his client's estate to himself. He had spoken to another attorney who warned him that the court would frown on such a will and had previously advised the client that another

attorney should draft the will. The attorney received an admonishment rather than formal discipline because the court felt that its earlier statements in another case might have misled the attorney. The court thus decided to issue the above-quoted statement to clarify its position, and more importantly, to prevent further discredit to the legal profession from the public's misconceptions of undue influence in these situations.

The Supreme Court of Colorado has similarly taken a firm position in People v. Berge, 620 P.2d 23 (Colo. 1980). In that case, Berge actually declined to prepare a will naming himself as the beneficiary and referred his clients to other attorneys including one individual with whom he shared office space. Because the attorney gave the clients no substantive advice, but merely acted as a scrivener, the court found this effort to urge the client to obtain disinterested advice was not sufficient and that the attorney who drafted the will was not "independent". The respondent had also failed to deal candidly with the client's heirs because of his conflict of interest as a beneficiary. The court suspended him for ninety days.

In In re: Barrick, 87 Ill.2d 233, 57 Ill. Dec. 725, 429 N.E.2d 842 (1981), the Illinois Supreme Court dismissed the charges against an attorney who had been charged with violating Rule 5-101(A). In that case, the attorney drafted the will for a

former client's wife who suggested that he be a legatee. He tried to convince her to have someone else draft the will but she insisted that he draft it. The court found that the circumstances therein justified the attorney in drafting the will where he had made full disclosure of the ethical considerations involved.

The court stated:

> "An attorney must not, of course, decide unilaterally whether the circumstances justify his accepting employment despite a conflict of interest. He may not proceed to represent his client without her free, intelligent, and informed consent. He must make sure she knows and understands the conflict and the threat it poses to the attorney's objectivity, and any other considerations material to the client's decision whether to entrust her affairs to the attorney. He must also take suitable precautions to minimize the dangers and disadvantages to the client of his double role, including the risk that the attorney's advice about the initial decision to proceed despite the conflict may itself be biased. And for his own protection, he should be prepared to prove later what really happened. All of this the respondent did.'' 429 N.E.2d at 846.

A year later in In re: Vogel, 92 Ill.2d 55, 65 Ill. Dec. 30, 440 N.E.2d 885 (1982), the Illinois Supreme Court ordered a censure of the respondent in a case where he had drafted several wills for long-time clients, the Hardistys. The court said that there was no doubt that the case did not involve the special circumstances found in Barrick because at least on one occasion

the respondent had accepted employment without any suggestion to his client of the problems involved and the desirability of securing independent counsel. 440 N.E.2d at 889.

The court outlined several reasons for prohibiting an attorney from drafting a will naming himself a beneficiary:

> "Among the reasons for including such action, absent exempting circumstances...are that it may well involve a disservice to the client for it involves the attorney in a conflict of interests, may affect his competency to testify, jeopardizes the will if a contest ensues, thus harming other beneficiaries and possibly nullifying the testator's intended distribution of his estate, and diminishes confidence in the integrity of the legal profession". Id.

In In re Conduct of Tonkon, 292 Or. 660, 642 P.2d 660 (1982), the Supreme Court of Oregon dismissed the charges against an accused attorney who had prepared a will naming himself a residual beneficiary. The client had been a close personal friend and the amount left to the respondent was a very small portion of his six million dollar estate. The court found there was no doubt that the client had consented after full disclosure, the testator had originated the bequest, and the accused was the testator's personal friend and the natural object of his bounty. 642 P.2d at 663. Furthermore, it held that drafting the will without advising the client to obtain independent legal advice

did not in itself violate the Code of Professional Responsibility.

In Disciplinary Board v. Amundson, 297 N.W.2d 433 (N.D. 1980), the North Dakota court found that the attorney's conduct in drafting a will naming himself as a beneficiary did not require discipline. Here the court found another case where unusual circumstances existed justifying the attorney's actions. In this case, Amundson had advised against drafting the will but the client refused to go to another attorney and insisted that Amundson draft the will. The court refused to adopt the strict position of the Wisconsin court in Collentine but stated that "in the future attorneys will have difficulty in convincing us of the 'unusual circumstances' which justify their drafting a will in which they are named as a beneficiary." 297 N.W.2d at 442.

In In re Disciplinary Action Against Prueter, 359 N.W.2d 613 (Minn. 1984), a disciplinary case of first impression, the Supreme Court of Minnesota publicly reprimanded an attorney who drafted a will naming he and his wife beneficiaries of one-half of his client's estate. The evidence indicated that the lawyer had once asked the client, a personal friend, why he did not seek another lawyer and the client replied if he wanted to do *so* he would. The court stated that wills of this nature provide a disservice because they present a possible conflict of interest

between the attorney, his client and other beneficiaries. In addition, the "public's perception of the profession is skewed because of such action." Id. at 616. In finding respondent guilty of violating **EC** 5-5, the court stated that propriety demands in such a serious matter that the attorney be publicly reprimanded.

In 1972, the Supreme Court of Ohio publicly reprimanded an attorney for drafting a will naming himself the sole beneficiary of his client's estate. Columbus Bar Association v. Ramey, 32 Ohio St.2d 91, 290 N.E.2d 831 (1972). The court found that respondent's conduct clearly violated EC 5-5 and did not fall within the exceptional circumstances provided for in the Code.

In 1988, the Ohio court suspended an attorney who had drafted a will designating he and his son as beneficiaries and naming himself executor. In Mahoning County Bar Association v. Theofilos, 36 Ohio St.3d 43, 521 N.E.2d 797 (1988), the court found that the attorney had suggested the client seek other lawyers but then drafted the will. At the client's death, respondent and his son stood to receive over $200,000.00. Because the attorney's conduct in merely suggesting that the client seek other counsel, rather than insisting she do *so,* violated **EC** 5-5, the court was of the opinion that respondent violated DR 1-102(A)(6).

The South Carolina Supreme Court publicly reprimanded an attorney for drafting a will giving him the option to purchase property at less than market value in Matter of Rentiers, 374 S.E.2d 672 (S.C. 1988). The attorney testified that he pled with the client to have another attorney prepare the will but she had refused. The client was a long-time personal friend hospitalized with terminal cancer at the time she executed the will.

The court found the attorney had failed to fully disclose the significance of the situation to the client. Specifically, the court stated:

> "Moreover, there is no evidence of Mrs. Petterson's having been informed that a Will, drawn by an attorney-beneficiary, is vulnerable to attack upon grounds of undue influence or that, in the event the Will is challenged, his credibility as a witness would be impaired by his personal interest in the outcome. Finally, Respondent failed to even advise Mrs. Petterson that his counsel may well be affected by that very interest." Id. at 674.

In the present case, there is no evidence of the disclosure of any of these important issues to the client. Respondent testified that he did not discuss his potential conflict and did not suggest an independent evaluation by another attorney. (RR, p.1) However, as the myriad of cases cited here seem to indicate, disclosure of the vulnerability of such a will is extremely important. As in Vogel, supra, and contrary to the

disclosures made in Barrick, supra, there was no suggestion to Mr. Schmidt of the potential problems involved with respondent drafting the will. Similarly there was no advice to Mr. Schmidt to seek another attorney, a factor which the courts found compelling in Amundson, supra, Berge, supra, and Barrick, supra.

Even in Tonkon, supra, wherein the Oregon court found there was no requirement in DR 5-101(A) that independent counsel be consulted, the result in the case turned on the fact that there was no doubt as to the client's consent because he was fully informed of the conflict presented. In the case at bar, the client was never fully informed of the conflict presented at the time the will was drafted and the respondent did not discuss the ramifications and changed circumstances after Mrs. Schmidt's death. (RR, p.3) Also contrary to the circumstances in Tonkon, in the present case, the respondent took a substantial part of the testator's estate in settling the lawsuit with the client's heirs. (Confidential Bar Exh.14).

In In re Vogel, supra, the Illinois court stated:

> "There is, for example, nothing before us to indicate any attempt by respondent to explain to his client the possibility that the will he drafted might be challenged on undue-influence grounds because of his dual role as drafter and beneficiary. This not unusual result occurred, with the consequence that a settlement giving the sons a portion of the estate thwarted Arthur's apparent intent to disinherit them."
> 440 N.E.2d at 889-890.

There was no explanation of the possibility of a challenge in the present case and the same result - a will contest resulting in a settlement between respondent and Mr. Schmidt's heirs. As stated by the referee:

> "When a client seeks the counsel of an attorney, that client has the right to have the benefit of the attorney's foresight and advice based on his training and experience. In this case, the likelihood that Mr. Schmidt's true wishes were carried out is doubtful. Either Mr. Schmidt erred when he made the Respondent the residual beneficiary of most of his estate, or he actually intended for the Respondent [to] have the money. Under either scenario his will was probably not carried out based on the circuit court settlement of the contest of the will." (Confidential Bar Exh.14).
>
> "Had the Respondent discussed the ramifications of the will or at least disclosed to Mr. Schmidt the conflict his preparing the will should have presented for him, the problem could have been averted: Mr. Schmidt's true desire would have been clear and could have been fulfilled." (RR, p.3)

Two elements, a full disclosure of the potential problems and a suggestion that independent counsel be sought, permeate all of the cases cited. In light of the caselaw surveyed, the glaring absence of these two elements in the present case dictate that public discipline is appropriate.

Similarly, the Florida Standards for Imposing Lawyer Sanctions, approved by the Board of Governors in November 1986, (hereinafter referred to as the Standards) dictate that a public reprimand would be the appropriate discipline in this case.

Section 4.33 of the Standards, which addresses failure to avoid conflicts of interest, provides that absent aggravating or mitigating circumstances:

> "Public reprimand is appropriate when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyer's own interests, or whether the representation will adversely affect another client, and causes injury or potential injury to a client."

This client was deprived of the opportunity for independent professional judgment by a disinterested attorney. He was also deprived of the benefit of knowing the particular vulnerability of a will drafted by an attorney-beneficiary. While it is arguable that the client was not injured because his intentions were carried out, the referee found that it is doubtful that Mr. Schmidt's true intent was fulfilled. (RR, p.3) However, even if his intentions were carried out, the potential for undue influence, overreaching, and conflict of interest was certainly present. Because the potential for injury existed, a private reprimand is inappropriate according to Subsection 4.34 of the Standards.

Section 9.1 of the Standards provides that aggravating and mitigating factors may be considered in justifying an increase or a decrease in the discipline to be imposed. Even if a private

reprimand was generally an appropriate discipline for the respondent's misconduct, notwithstanding the absence of a prior record, respondent's substantial experience in the probate field as well as his refusal to acknowledge the wrongful nature of his misconduct as evidenced by his litigation with the client's heirs and retention of a substantial part of the estate in settlement, justifies the increase to a public reprimand.

The goals of the Supreme Court of Florida in imposing lawyer sanctions were outlined in The Florida Bar v. Lord. 433 So.2d 983, 986 (Fla. 1983). Protection of the public from unethical conduct, encouragement of reformation and rehabilitation of the respondent, and the deterrence of other attorneys are best served by public discipline. Notwithstanding any lack of intent, the seriousness of the respondent's actions demand public discipline.

In The Florida Bar v. Welty, 382 So.2d 1220 (Fla. 1980), this Court laid out instances in which a public reprimand is appropriate:

> "Public reprimand should be reserved for such instances as isolated instances of neglect, The Florida Bar v. Larkin, 370 So.2d 371 (Fla. 1979); or technical violations of trust accounting rules without willful intent, The Florida Bar v. Horner, 356 So.2d 292 (Fla. 1978); or lapses of judgment. The Florida Bar v. Welch. 369 So.2d 343 (Fla. 1979)." 382 So.2d at 1223.

Respondent's conduct in this matter could certainly be considered a lapse of judgment, however unintentional it may have been. As stated succinctly by the South Carolina court in Rentiers, supra,:

> "An attorney who prepares a Will in which he is a beneficiary has engaged in a perilous undertaking. At best, he compromises his capacity to provide his client with sound professional advice; at worst, he renders himself incapable of serving her best interest;..." 374 S.E.2d at 673.

Such a lapse of judgment warrants a public reprimand.

CONCLUSION

WHEREFORE, The Florida Bar respectfully requests this Honorable Court to review the Report of Referee, the findings of fact and recommended discipline, and impose nothing less than a public reprimand with a one-year period of probation, including completion of an appropriate ethics course and preparation of a legal ethics paper, as well as order payment of costs in this proceeding, currently totalling $1,011.90.

Respectfully submitted,

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BY: 

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Bar Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing Complainant's Brief In Support Of Petition For Review have been furnished by ordinary U.S. mail to the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida, 32399-1925; a copy of the foregoing has been furnished by ordinary U.S. mail to Jerry A. DeVane, counsel for respondent, at Post Office Box 1028, Lakeland, Florida 33802; and a copy of the foregoing has been furnished by ordinary U.S. mail to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, on this 28th day of June, 1989.

Alana C. Brenner
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